Supreme Court of the United States

OCTOBER TERM, 1912.

No. 244

CITY OF OWENSBORO, ... Appellant

vs.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, ... Appellee

BRIEF FOR APPELLEE.

STATEMENT.

May it Please Your Honors:

This appeal involved the right of the City to repeal an ordinance passed in 1889 granting to the Cumberland Telephone & Telegraph Company the right to erect and operate a telephone plant in the City of Owensboro, Kentucky.

The grant, made on December 4, 1889, by the Common Council of the City of Owensboro, is as follows:

> "Be it ordained by the Mayor and Common Council of Owensboro, Ky.:
>
> That the Cumberland Telephone Company, its successors and assigns, is authorized and hereby

granted the right to erect an maintain upon the public streets and alleys of said city any number of telephone poles of proper size, straight and shaved, smooth, set plumb and set erect, and any number of wires thereon with the right to connect such wires with the building when telephone stations are established, provided that such poles shall be located and kept so as not to interfere with the travel upon said streets or alleys or the substantial use thereof by the inhabitants of said city.

SEC. 2. That the said Cumberland Telephone Company shall erect only one line of poles on a street, except for the length of one block upon the street upon which the exchange building may be located, and where the wires of said company enter such exchange building the said company shall have the right to erect and maintain its poles on both sides of such streets and the lowest wire of said telephone company shall not be less than twenty-five feet from the ground, except where such wires enter the exchange building or telephone stations.

Nothing in this ordinance contained shall be construed as an exclusive right to said company to erect and maintain said poles upon the streets and alleys of said city, and no obstruction shall be placed by said company to the erection and maintenance of poles by any other person or company. Such company shall enjoy such rights in common with all other persons or companies to whom said city may see proper to extend the same right.

SEC. 3. The said telephone company shall repair all streets and alleys it may enter upon and use for the purpose herein provided, which by the acts of said company or persons in its employ shall have become injured or damaged or been made unsafe.

All proper precautions and safeguards shall be used to prevent such use from becoming either injurious or annoying to the inhabitants of said city, and should any damage or injury result to any person or property by reason of the erection and maintenance of such poles, or the failure to keep the streets and alleys in repair as herein required, and said city shall be held liable by reason thereof, such company shall pay all damages and costs resulting therefrom to the parties injured, or to the city, if paid by her.

SEC. 4. The rights and privileges herein granted to said telephone company are upon the terms and conditions following, *viz.:* That said Company shall furnish free of charge one telephone for each engine or hose house, now erected or which may hereafter be erected by said city, one for police-headquarters, and one for the mayor's office, making at this time only two such telephones to be furnished by said company for the use of the city,—shall be kept in good order for constant use by said company.

Said Company shall also allow the city the exclusive use of two feet of one arm on each pole for its fire alarm telegraph. The fire alarm telegraph poles of the city may be used by said company for its wires, provided such wires be kept two feet from the said fire alarm telegraph wires, and such poles used by said telephone company shall be replaced by it when needed.

SEC. 5. All poles of said telephone company shall be set close to the inner side of the sidewalk curbing.

SEC. 6. This ordinance may be altered or amended as the necessities of the city may demand.

This ordinance shall be in force from and after its passage."

Trans., pp. 3 and 4.

Under this authority the telephone company immediately erected a telephone exchange and offered the public a telephone service. The City of Owensboro erected its fire alarm wires on the poles and has maintained the same there continuously since. The free telephones required by the ordinance have been furnished and maintained by the Telephone Company, and used by the City continuously since.

Stipulation, Trans., pp. 116-17.

In January, 1909, the City undertook to repeal this ordinance by adopting an ordinance reading as follows:

"Be it ordained by the Common Council of the City of Owensboro:

SECTION 1. That, whereas the Cumberland Telephone & Telegraph Company has heretofore erected numerous poles in the streets of the City of Owensboro, with wires attached thereto, and has maintained same without right, and whereas said poles and wires obstruct the use of said streets and are a nuisance therein, and it is desirable and beneficial to the city and the use of said streets that said poles and wires be removed therefrom:

It is ordained that same be removed and said company is hereby required to remove same within a reasonable time from the passage of this ordinance, and upon their failure to do so the Mayor is authorized and directed to have same removed, *Provided, however*, that said Company shall have the right to purchase from said city a franchise

authorizing it to maintain said poles and wires and use same as provided under the laws of the State, upon proper conditions to be prescribed by an ordinance to be passed upon request of said company to the common council of said City.

SEC. 2. All ordinances in conflict with this ordinance are hereby repealed.

SEC. 3. This ordinance shall take effect from and after its final passage."

Trans., p. 8.

To enjoin the enforcement of this repealing ordinance the bill in this case was filed in the Circuit Court, upon the ground that the obligation of the contract with Appellee was violated by the attempted repeal. The Judge of the Circuit Court held that the repealing ordinance was void and violated the obligation of the contract created under the first above mentioned ordinance passed in 1899, and the City has appealed.

Trans., p. 118.

RES ADJUDICATA.

Appellant insists that in a prior litigation between the same parties in the State Court, the invalidity of the granting ordinance has beona djudicated, and for this position relies upon the following facts set up by plea in the court below:

In 1900 the City of Owensboro commenced the construction of an electric light plant and was erecting its poles and wires in such close proximity to the poles and wires of the Telephone Company as to cause that Company serious concern on account of the high currents of

electricity in the electric light wires, which, it was feared, would destroy the usefulness of the telephone wires, which carry a very low current of electricity. Thereupon suit was instituted by the Telephone Company against the City seeking to restrain it from erecting its electric light wires in such manner as to interfere with the telephone wires. Necessarily in its bill the Telephone Company set up its contract rights with the City of Owensboro, which were threatened. A temporary injunction was granted and immediately dissolved, and application made to a Judge of the Court of Appeals of Kentucky for its reinstatement, which was refused. Thereupon, under the local practice of the Kentucky courts, the case proceeded to a final conclusion without a temporary injunction being in force, and when the case came on for final hearing the City had completed its lighting plant; and the Court, in deciding the case, held that, because the plant had already been completed, it was not proper to grant an injunction—the exact language of the Court being:

> "I was strongly convinced on the original application that an injunction ought not to be granted, and in my opinion no change has taken place in the principles and legal ideas than actuating the Court. Indeed the present situation is more strongly against it, on the idea that an application for injunction will always be denied, 'when it appears that the act to be enjoined has already been committed.' Though it may appear that the alleged evils apprehended by plaintiff, expressed in its petition have been fully realized by defendant's consummation of its then projected work, I deem that no argument is in favor of now granting the injunction."
>
> Trans., p. 98.

The Court adds:

> "In passing upon the question of granting or refusing the injunction I deem in wholly unnecessary to pass upon the validity or invalidity of the ordinance discussed."
>
> Trans., pp. 98—9.

The decree of the Court was in general terms, denying the injunction, but making the written opinion a part of the record.

Trans., p. 97.

The contention of Appellant is that every question raised by the pleadings in that case is concluded in all future litigation between the same parties; but it is insisted that this contention rests upon a mistaken conception of the law.

This litigation is between the same parties, but it is upon an entirely different cause of action. Therefore only such matters in the former litigation are precluded as were expressly adjudged in that litigation.

The general rule is no where better stated than by this court in *Virginia C. C. Co.* vs. *Kirven*, 215 U. S., 257, where it is said:

> "It is established that the bar of a judgment in another action for the same claim or demand between the same parties extends to not only what was pleaded or litigated in the first action, but what might have been pleaded or litigated. If the second action is upon a different claim or demand, the bar of the judgment is limited to that which was actually litigated and determined."

The party setting up the judicial estoppel in the subsequent suit must affirmatively show that the particular point was adjudicated and concluded in the former suit.

De Sollar vs. *Hanscome*, 158 U. S., 216;
Steam Packet Co. vs. *Sickles*, 24 How., 333;
Packet Co. vs. *Sickles*, 5 Wall., 580;
U. S. vs. *Green*, 185 U. S., 256;
Vicksburg vs. *Vicksburg Water Works Co.*, *206* U. S., 496.

In the case of *De Sollar* vs. *Hanscome*, supra, the Court, in denying the estoppel, said:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to the same question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit."

In the case at bar Appellant has introduced the record in the former suit wherein it is conclusively shown that the particular question now sought to be precluded by the former litigation, was not determined, the Court expressly stating in its opinion in that cause that the question now involved was not determined.

It is, therefore, insisted that no question of *res adjudicata*, or judicial estoppel, is involved in the present case.

CHARTER RIGHTS.

It is further insisted by Appellant that since the Cumberland Telephone & Telegraph Company, which was in existence in 1889, when the grant by the City of Owensboro was made, subsequently consolidated with another Kentucky corporation, all of the rights possessed by the grantee corporation lapsed immediately upon the consolidation taking effect. The facts are these:

The Cumberland Telephone & Telegraph Company was organized under the Kentucky statues in 1883 for a period of twenty-five years; the Great Southern Telephone & Telegraph Company was organized under the Kentucky statutes in the same year for a like period; these two companies consolidated in 1889 under the name of Cumberland Telephone & Telegraph Company, and, among other things, in the articles of consolidation, it is provided:

> "Twelfth. Upon the execution and completion hereof, this consolidated corporation shall be vested with all the property, business, credits, assets, and effects of the said consolidating or constituent corporations, without deed or transfer, and shall be bound for all their contracts and liabilities; and the rights, duties, and liabilities of this corporation and the rights and duties of its stockholders shall be as prescribed by the laws of the Commonwealth of Kentucky."
>
> Trans., p. 25.

Thereafter, in January, 1900, that Cumberland Telephone & Telegraph Company consolidated with the Ohio Valley Telephone Company, likewise a Kentucky corporation, under the name of Cumberland Telephone & Tele-

graph Company, and in the articles of consolidation it was provided:

> "Eleventh. Upon the execution and completion hereof, this consolidated corporation shall be vested with all the property, business, credits, assets, and effects of the said consolidating or constituent corporations, without deed or transfer, and shall be bound for all their contracts and liabilities; and the rights, duties and liabilities, and powers and privileges, and franchises of this corporation, and the rights and duties of its stockholders shall be the same as those of the consolidating Companies, or as prescribed by the laws of the Commonwealth of Kentucky, in cases of consolidating corporations."
>
> Trans., p. 42.

These consolidations were had under the authority of the Act of Kentucky of April 5, 1893, which, among other things, provides:

> "When the agreement is signed, acknowledged and recorded in the same manner as articles of incorporation are required to be, the separate existence of the constituent corporations shall cease, and the consolidated corporations shall be come a single corporation in accordance with the said agreement, and subject to all the provisions of this chapter, and other laws relating to it, and shall be vested with all the property, business, credits, assets and effects of the constituent corporations without deed or transfer, and shall be bound for all their contracts and liabilities."

It is thus seen that, under the Kentucky statutes, while the separate existence of the constituent corporations cease, the consolidated corporation becomes at once,

without deed or transfer, the owner of all of the property of the constituent corporations; and, therefore, whatever rights either of the constituent companies possessed, became at once the property of the consolidated corporation.

This exact question has been fully considered by this Court in *Louisville* vs. *Cumberland Telephone & Telegraph Company*, 224 U. S., 661. In that case this Court construed the consolidating statutes of Kentucky with respect to the rights of this particular Company, and held that a street franchise is property, and "being property, it was taxable, alienable and transferable, and, as property, passed to the Cumberland Telephone & Telegraph Company under the express provisions of the Kentucky Statute, which, as of force in 1900, declared that the consolidated company should be 'vested with all the property, business, assets and effects of the constituent companies, without deed or transfer, and bound for all their contracts and liabilities' ".

Therefore, whatever rights, franchises or easements the Cumberland Telephone & Telegraph Company acquired under the ordinance of 1898 from the City of Owensboro is the property of the present Cumberland Telephone & Telegraph Company, Appellee in this case.

As in the *Louisville* case (supra), so in this case, the City dealt with the consolidated Company as it did with the original Company; it continued to use the free service, continued to use the poles for its police and fire alarm wires, and assumed to regulate the rates to be charged its citizens, and it did nothing manifesting the purpose or desire to treat the contract relations at an end, but

permitted the consolidated Company to continue to extend its plant and equipment in serving the inhabitants of the City. No action was taken looking to even an attempted repeal of the rights granted in 1889, until a controversy arose concerning the rates to be charged for service in 1908—after two consolidations, and nearly one year after the original period fixed in the company's charter had expired.

THE RIGHT ACQUIRED UNDER THE 1889 ORDINANCE.

The contention of Appellant is that in 1889, when the ordinance undertaking to grant to the Telephone Company the right to erect and operate a telephone exchange in the streets was passed, the City of Owensboro had no authority to make such grant, and, therefore, the ordinance conferred a mere license, revocable at will.

This question was fully considered by the Court of Appeals for the Sixth Circuit, Judge Lurton delivering the opinion of the Court. The question arose in another litigation between the Telephone Company and the City of Owensboro, involving the question of rate regulation under the ordinance of August, 1908, but in that case, as in this, the City insisted that since it had no authority to make the grant contained in the ordinance of 1889, the Telephone Company was without right on its streets, and, therefore, could not object to any rate the city saw proper to impose or require of it. In discussing the question of whether the City had the power to make the grant of 1889 the Court said:

> "But it is said that neither the general law of the State nor the special charter under which the

City was then operating delegated to the City the power to permit the streets of the city to be occupied by the poles and wires of a telephone company.

It may be conceded that neither a telegraph nor a telephone company can lawfully occupy the streets or alleys of a town without direct legislative authority, or by municipal consent in pursuance of powers delegated by the State. *Morristown* vs. *East Tennessee Telephone Company*, 115 Fed., 304, 305, 53 C. C. A. 132.

That both the municipality and the telephone company supposed that the city had the authority under its charter powers to permit the establishment of poles and the stringing of wires along its streets and alleys is clear from the exercise of the power by the mayor and common council and the action which the telephone company took under this ordinance in entering upon and constructing a telephone system at a cost of more than $100,000.

That power to permit the use of highways and streets for such purposes must reside somewhere is obvious. Primarily, it resides in the Legislature of each State, but, as is well known, is almost universally delegated to the municipality concerned. Reasons of convenience, as well as theories of local rule in strictly local matters, lead us to expect that the local government has the power to regulate the use of its own streets.

Did the local government of Owensboro usurp the legislative functions of the State when it granted a street easement to the Cumberland Telephone & Telegraph Company? We think it did not.

The charter under which Owensboro was

governed in 1889 was a special act of the Kentucky Legislature enacted in 1882. See Acts 1881–82, pp. 817–856, c. 461. It provides for a complete system of municipal government and includes no less than 120 sections, many of which are divided into subsections. Among the powers conferred by section 10 is that of 'control of the finances and all property, real and personal, belonging to the city, and to enact ordinances for a large number of purposes later enumerated. Among the purposes for which it is given legislative power is 'to regulate the streets, alleys and sidewalks, and all improvements and repairs thereof,' etc. Unless this provision gave to the city the power to control its own streets by regulating the uses to which they might be put in the public interest, it was without any such power, aside from that which might be regarded as inherent in a corporation created for the purposes of a municipal government. That such a corporation can exercise only those powers which are either expressly granted or plainly implied from those so granted, or essential to the declared purposes and objects of the corporation, is well settled law. *Detroit, etc., Ry.* vs. *Detroit*, 64 Fed., 628, 639, 12 C. C. A. 365, 26 L. R. A., 667.

But the use of a public street for the construction of poles to carry the wires of such a company is a use within the range of the purposes for which a street may be legitimately used, whether the fee be in the city or its interests be confined to an easement in the land for street purposes. This seems to be the settled rule in Kentucky. *Cumberland Telephone & Telegraph Co.*, vs. *Avritt et al.*, 120 Ky., 34, 38, 85 S. W. 204. In the case just cited, the Kentucky court held that such a use was for a public and not a private purpose, and that the easement of the public included such a method of use, and imposed therefore no new burden upon the

owner of the fee in the street. If, then, such a use is within the general objects and purposes to be served by the power of opening and maintaining public streets why is the grant of a right to so use the public streets an act beyond the powers of the municipal legislature? What power is delegated by the express power to 'regulate' the streets and alleys of the city? Manifestly, something was meant by the power to 'regulate.' The word 'regulate' imports the power to control the use of the streets, and is indeed a word of wider import than 'control' or the power to 'consent' to an easement of way.

In *Detroit, etc., Ry.* vs. *City of Detroit*, 64 Fed., 628, 636, 12 C. C. A. 365, 26 L. R. A., 667, this court held that if under the law of the State of Michigan a street railway was but an improved mode of street use, and therefore not an additional servitude, which might be restrained by abutters, the general powers vested in the City of Detroit to 'prescribe, control and regulate' the manner in which the City streets might be used was broad enough to permit the use of its streets for such a purpose by a company having the requisite franchise of a street railway from the State.

In Section 575 of Dillon on Municipal Corporations, the author, after stating that the usual powers of a general nature delegated to municipal corporations are not sufficient to confer upon them the right to authorize the presence of commercial steam railways upon the streets, says:

> 'But it is otherwise as respects street railways; and the ordinary powers of municipal corporations are usually ample enough, in the absence of express legislation on the subject, to authorize them to permit or refuse to permit

the use of streets within their limits for such purposes.'

In *St. Louis* vs. *Western Union Tel. Co.*, 149 U. S. 465, 469, 13 Sup. Ct., 990, 992 (37 L. Ed. 810), the court, in discussing the power conferred upon St. Louis over its streets, said:

'The word 'regulate' is one of broad import. It is the word used in the federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used. If it should see fit to construct an expensive boulevard in the city, and then limit the use to vehicles of a certain kind or exact a toll from all who use it, would that be other than a regulation of the use? And so it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been to in opening and improving the street.'

So in 28 Cyc., p. 867, note 55, it is said:

'Under the power to 'regulate' the use of streets, municipal authorities may permit their use for railroad tracks, poles, wires, pipes, etc., of a public nature not inconsistent with the public use to which the streets were dedicated. *State* vs. *St. Louis*, 161 Mo., 371, 61 S. W. 658; *State* vs. *Murphy*, 134 Mo., 548, 31 S. W. 784,

34 S. W. 51, 35 S. W. 1132, 34 L. R. A., 369, 56 Am. St. Rep., 515; *Schopp* vs. *St. Louis*, 117 Mo., 131, 22 S. W. 898, 20 L. R. A. 783; *Pikes Peak Power Co.* vs. *Colorado Springs*, 105 Fed., 1, 44 C. C. A. 333.'

See also *State* vs. *Jacksonville R. Co.*, 29 Fla., 590, 10 South, 590.

Counsel for appellants have cited *East Tennessee Telephone Company* vs. *City of Russellville*, 106 Ky., 667, 51 S. W. 308, as supporting their claim that the general powers found in the charter of Owensboro are not sufficient to sustain the ordinance in question. The ordinance, there referred to as antedating the present Constitution of the State, granted an 'exclusive' franchise. The court said of that exclusive franchise that:

> 'At that time the councilmen of the city had no legislative authority, express or implied, which authorized them to grant such a privilege to him.'

The ordinance under which the Cumberland Telephone Company exercises its street easement expressly provides that the privilege shall not be exclusive. Furthermore, in the Russellville Case, had the ordinance been valid, Clark to whom the privilege was granted, had not started work, in good faith, before the adoption of the new Constitution. Hence his easement was not saved by the proviso found in section 163. But aside from all this, it does not follow that because Russellville did not have power to grant a right or easement to a telephone company under its charter that Owensboro had not the power. The opinion does not show whether Russellville had the power to 'regulate' its streets as Owensboro had.

The case of *Louisville Railway* vs. *City of Louisville*, 8 Bush (Ky.) 415, is not in point. The only question in the case was whether the city might require a street railway company to remove its rails in order to allow the city to repave the street. The city railway was in the streets under an ordinance authorized by express legislative power. All that was said in reference to the insufficiency of a power to control and regulate, to support consent to occupation of streets by a street railway, was foreign to the case and not authoritative.

Other decisions of the Kentucky court cited have been examined. None of them made prior to the inception of the rights here involved concerned the interpretation of any municipal power as is implied from the general power to 'regulate' the use of streets, and none made since the rights of appellee arose are controlling upon this court in the exercise of its independent judgment in respect to rights which arose before such decisions."

City of Owensboro vs. *Telephone Co.*, 99 C. C. A., 1.

In addition to this the Court of Appeals of Kentucky has held that the Fiscal Court of a county, by virtue of its general power to repair and supervise the county roads, is invested with power to grant a franchise for the use of the county roads.

In *A. C. and F. Co.* vs. *Johnson County*, 147 Ky., 71, the Court says:

"The right to grant a franchise presupposes and is based upon the right of the authority granting the franchise to control the property over which the franchise is granted or which is affected by it. For example, the fiscal court could grant a

franchise authorizing the erection of poles along the highways of the county, as the fiscal court has control of the highways. And so, municipal corporations may grant franchises to use the streets and public ways of a city, as the municipality has control of the streets and public ways."

In *Jackson-Hazard Telephone Co.* vs. *Holliday, Admr.*, 143 Ky., 150, the court says:

"That the Fiscal Court, having as it did, under section 4306 of the Kentucky Statutes, the control and supervision of the public roads of the county, had authority before the enactment of Section 4639-b of the Kentucky Statutes to grant the Company the right to erect its poles along this road in the absence of a statute expressly giving the court such authority, is, we think, settled by the case of *Cumberland Telephone & Telegraph Company* vs. *Avritt*, 120 Ky., 34."

In the last cited case, the Court says:

"The telephone takes the place of the private messenger. The transmission of messages by telephone is a business of a public character, which is conducted under public control in the same manner as the carriage of persons or property. The easement of the public is not limited to the particular method of use in vogue when the easement is acquired, but includes improved methods which the progress of society finds necessary for business. The public easement in a highway is not confined to the transportation of persons or things in vehicles."

Section 4306 of the Kentucky Statutes referred to provides:

"The fiscal court of each county shall have gen-

eral charge and supervision of the public roads and bridges therein, and shall prescribe necessary rules and regulations for repairing and keeping the same in order, and for the proper management of all roads and bridges in said county under and subject to the provisions of this act. The public roads shall be maintained, either by taxation or by hands allotted to work thereon (or both) in the discretion of the fiscal court of the respective counties, as hereinafter provided."

Section 4639-b referred to, grants directly to telephone companies the right to use the county roads outside of incorporated cities, only leaving to the Fiscal Courts authority to designate the manner of such use.

Prior to this Act in 1904 the Kentucky Legislature had never assumed to exercise control over the county roads, but had left the control and granting of rights-of-way to the local authorities; and before the Constitution of 1891 the Legislature never did, by statute, assume to exercise any control over the streets of a municipality, but all rights to telephone companies were conferred directly by the municipalities under the authority of the Legislature giving to them the control and regulation of the use of the streets.

Therefore, in Kentucky the only way in which a telephone company could secure the right to erect poles on the streets in a municipality was by action of the municipality, and not by the State.

The authority conferred in this section upon the Fiscal Court with respect to county roads is no broader than the charter powers granted by the Legislature to the City of Owensboro—the City having power under its charter

"to regulate the streets, alleys and sidewalks and the improvements and repairs thereof," and is given "control of the finances and all property, real and personal, belonging to the City."

In other words, the city is given the control of, and the right to regulate the streets. The Fiscal Court is given general charge and supervision of the public roads. Necessarily, the city had the authority by express grant from the Legislature to grant a franchise in the streets if the Fiscal Court has the power to grant franchises on the county roads, as is held by the Kentucky Court of Appeals.

DURATION OF THE GRANT.

Appellant insists that even though the City had the power to make the grant in 1889, a proper construction of its terms limits it to twenty-five years, that being the initial period of the life of Appellee.

In discussing this question Appellant proceeds upon an erroneous assumption of fact. It *assumes* that the Cumberland Telephone & Telegraph Company, which was chartered in 1883, ceased to exist twenty-five years thereafter, and that, therefore, the grant made in 1889 also ceased. This view is not true. At the time the Telephone Company was chartered in 1883, the Kentucky Statutes under which the Company was organized provided that corporations for the construction of any work of internal improvement could be formed to endure for fifty years, and those formed for other purposes not to exceed twenty-five years in duration; "but in either case they may be renewed from time to time for periods not greater than was at first permissible if three-fourths of the

votes cast at any election held for that purpose should be in favor of such renewal."

General Statutes of Ky., 1883 (Bullitt & Feland).

So that while this Company was organized with an initial period of existence of twenty-five years, it had the right under the very statute which authorized its creation, to continue to exist for as long a period of time as its stockholders might desire.

And in accordance with this right, its life *has been* prolonged, and it is now a corporation with a life limited to two hundred years from January 27, 1900; and all of this was done prior to the expiration of the first twenty-five years.

Trans., p. 41.

So that whether the contention of Appellant that franchises without limitation are only for the life of the corporation or in perpetuity, is wholly immaterial in this case. The life of this corporation has not expired, and therefore this contention is immaterial in the present case.

There are cases holding that where a franchise is unlimited as to time it exists for the life of the corporation and then ceases; but these cases find no support in the decisions of this Court, and, indeed, are based upon peculiar facts and circumstances surrounding the particular grants considered by the courts in those cases. Some of them—in fact, practically all of them—refer to the case of *Turnpike* vs. *Illinois*, 96 U. S. 63[illegible]; and that case is relied upon by Appellant, but the particular point upon which that case rests seems to have been overlooked by some courts and by Appellant in this case. There it is said:

"At common law, a grant to a natural person, without words of inheritance, creates only an estate for the life of the grantee; for he can hold the property no longer than he himself exists. By analogy to this, a grant to a corporation aggregate limited to the duration of its existence, without words of perpetuity being annexed to the grant would only create an estate for the life of the corporation."

In all of these cases the duration of the grant is arrived at by construction. The terms of the grant control. In the present case the grant was to Cumberland Telephone & Telegraph Company, *its successors and assigns*. It was expressly provided that the ordinance could be altered or amended as the interest of the City might demand. It was further provided that the ordinance should not be construed as an exclusive right; and it was further provided that no obstruction should be placed by the Company to the erection or maintenance of poles by any other person or company, and that such rights should be enjoyed by all other persons or companies to whom the City might extend the same rights.

The City under this grant has reserved all of its police powers with respect to granting similar rights to other concerns, regulating the places and manner of erecting poles and wires, requiring them to be put underground or erected on poles overhead, prohibiting any obstructions being placed in the way of other companies to whom the city might allow the use of the streets. But, in addition to this, the grant was for a consideration other than procuring a telephone service for its inhabitants. It gave to the City the use of its poles for carrying the city's police and fire alarm wires, and it gave free telephone service to the City.

It must also be noted that in the repealing ordinance there was no suggestion by the CommonCouncil of the Cty that the grant made in 1889 had expired, but proceeded upon the idea that no rights had ever been acquired. The repealing ordinance in its first paragraph states that the Company "has heretofore erected numerous poles in the streets of the City of Owensboro, with wires attached thereto, and has maintained the same without right."

It is also to be noted that while in the first paragraph it is stated that the poles and wires obstructed the use of the streets and "are a nuisance, and it is desirable and beneficial to the City and the use of the said streets that said poles and wires be removed therefrom," yet in the second paragraph it is provided that "said company shall have the right to purchase from said City a franchise authorizing it to maintain said poles and wires and use the same as provided under the laws of the State."

It is thus seen that the City proceeded upon the idea that the Company had never acquired any rights; and, second, that while the poles and wires were a nuisance and it was very desirable to have them removed, yet if the Compan ydesired, the City would grant It a franchise to maintain the poles as they were.

It is also to be noted that under the police powers of the City if any pole obstructed traffic or was improperly located, the City had ample power and authority to require the relocation of the pole in such manner as would not be objectionable.

It is also to be noted that these poles did not become a nuisance in the streets until the telephone company declined to yield to the rates fixed by the city for telephone

service in the ordinance adopted in August, 1908, preceding the repealing ordinance which was adopted in January, 1909.

It must also be remembered that a telephone company cannot construct its plant and then operate it. It must continue the construction so long as it continues in use. Unlike a street railway, gas, water or electric light plant, a telephone exchange is built gradually. It is first built to accommodate such patrons as are reasonably presumed to desire service so soon as the plant is put into operation; but, as each new patron is secured, additional wires must be strung from the central station or switchboard to the patron's place of business or residence, new apparatus installed in the patron's house, and connections made by additions to the switchboard which will enable him to be put into communication with existing patrons. So that as the city grows and new persons have need of telephone service the telephone company must continue to enlarge and increase its plant. So that a telephone company—inherently different from other public service companies—must be assumed to have contracted with the City, and the City must be assumed to have contracted with the telephone company with the understanding and knowledge that the plant must continue to grow from year to year, and therefore a limitation of time upon the grant would of necessity either require the telephone company to increase its plant to the last moment of its life, or require the inhabitants of the city to be deprived of telephone facilities for a reasonable period just preceding the expiration of the life of the grant, since it is not to be prosumed that a company would continue to invest new capital in a plant up to the day it was to be taken down.

Especially is this true when it is shown that to take down a telephone plant involves a loss of from 80 to 85% of its cost.

Depo. of Caldwell, Trans., p. 118.

In construing this grant we have the right to assume that the parties contracted with reference to the particular subject matter of the grant and its inherent peculiarities. The City placed no time limit upon the grant, but safeguarded in every way the rights of the City, by reserving the right to use the same poles for its fire alarm wires (never intending to damage itself by having to remove its wires and erect poles for its own use), providing itself with adequate telephone service as the demand therefor increased from time to time, reserving the right to make grants for similar purposes, and finally, providing for unknown and unforeseen contingencies in exacting: "This ordinance may be altered or amended as the necessities of the City may demand." If it be proper, or necessary to resort to a construction of this ordinance to ascertain the time it was intended to operate, the conclusion is inevitable that it was to run to the Telephone Company, "*its successors and assigns*," in perpetuity.

This contention is sustained by all the decisions of this Court; and this, too, whether the charter of the Company was for twenty-five years, or a longer period.

In *Detroit* vs. *Detroit, etc., Ry. Co.*, 184 U. S., 395, it is said:

> "We see no reason why the Company could not take the extended term as provided for in the ordinance, and it formed a good consideration for

the agreement on the part of the company to perform the other obligations contained in the ordinance. This exact proposition has been determined by the Circuit Court of Appeals for the Sixth Circuit in *Detroit Citizens' Street Railway Company & others* vs. *City of Detroit*, 12 C. C. A., 365; same case 64 Fed. Rep., 628. In the course of the opinion of the Court in that case, the cases of *People* vs. *O'Brien*, 111 N. Y. 1, and *Miner* vs. *New York Central Railroad Company*, 123 N. Y., 242, were cited. *People* vs. *O'Brien* is one of the leading cases in New York upon that subject, and it was there held that a corporation, although created for a limited period, might acquire title in fee to property necessary for its use, and where the grant to a corporation of the franchise to construct and operate its road in the streets of a city is not, by its terms, limited and revocable, the grant is in fee, vesting the grantee with an interest in the street in perpetuity to the extent necessary for a street railroad; the rights granted to be exercised by the corporation or whomsoever may lawfully succeed to such right. In that case the authorities show that a franchise of the above nature is invested with the character of property and is transferable as such, independently of the life of the original corporation. The other case, in 123 N. Y., announces the same doctrine. It is not a new one, and the decisions have all been one way, in favor of the right of a corporation, limited as to the time of its corporate existence, to purchase or acquire by agreement or condemnation property for its use, the title to which it might own in fee."

In *Louisville* vs. *Telephone Co.*, 224 U. S., 649, the authorities are again reviewed, and the Court approves the following:

"Where the grant to a corporation of a fran-

chise to construct and operate its road is not, by its terms, limited and revocable, the grant is in fee."

To the same effect are:

Walla Walla vs. *Water Co.*, 172 U. S., 9;
People of the State of New York vs. *O'Brien*, 111 N. Y., 1;
Detroit, etc., Ry. vs. *Detroit*, 12 C. C. A., 365, 64 F. R. 628;
Detroit vs. *Detroit, etc. Ry.*, 184 U. S., 395;
Trustees of Southampton vs. *Jessup*, 162 N. Y., 122;
Town of Arcata vs. *Arcata & N. R. R. Co.*, 92 Cal., 639;
People vs. *Central Union Tel. Co.*, 192 Ill. 307;
Hudson Telephone Co. vs. *Jersey City*, 49 N. J. Law, 304;
People vs. *Deeham*, 153 N. Y., 528.

For these reasons it is respectfully submitted that the City was without authority or power to disturb the vested rights of Appellee to conduct a telephone business in the City of Owensboro, because of the Constitutional provisions against the impairment of the obligation of contracts, and against the taking of property without due process of law.

Respectfully submitted,

CLARENCE M. FINN,
HUNT CHIFLEY,
WILLIAM L. GRANBERY,
Solicitors for Appellee.